

LEGAL ALERT

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U.S. SUPREME COURT DECLINES TO PROVIDE CLARITY ON THRESHOLD QUESTION OF ARBITRABILITY

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Construction contracts often include arbitration provisions that require any dispute arising out of a project be resolved through binding arbitration. But who decides whether such a dispute is subject to the arbitration provision? The answer to that question is not always clear, and a recent decision (or refusal to make a decision) by the U.S. Supreme Court failed to bring the answer further into focus.

In *Henry Schein, Inc v. Archer and White Sales*, 592 U.S. ___ (2021), the U.S. Supreme Court made the unexpected decision to dismiss the case despite having already heard oral arguments. It was the second time the case made its way to the highest court. In dismissing the case, the Court leaves unresolved the effect of an arbitration provision that contains both a clear and unmistakable delegation of questions of arbitrability to an arbitrator and language that exempts, or carves out, certain claims from arbitration. With this question unresolved, it is imperative that parties use clear and unambiguous language when drafting arbitration provisions.

CASE SUMMARY:

Henry Schein Inc. began as an antitrust dispute involving the sale of dental equipment. In 2012, Archer and White sued Henry Schein and its subsidiaries alleging violations of federal and Texas antitrust laws, seeking both money damages and injunctive relief. The contract between the two parties included an arbitration agreement that delegated questions of arbitrability (whether a claim was subject to arbitration) to an arbitrator. The contract also contained carveout language that excluded actions for injunctive relief from arbitration.

A magistrate judge initially compelled arbitration based on the contract's arbitration provision. The District Court disagreed, however, because it found the argument in favor of arbitration "wholly groundless" based on the carveout language. Instead, the District Court found that it had the authority to decide the threshold issue of arbitrability. The U.S. Court of Appeals for the 5th Circuit affirmed, finding that it need not consider whether the arbitration clause delegated questions of arbitrability to an arbitrator because Henry Schein's argument in favor of arbitration was "wholly groundless."

The case was appealed to the U.S. Supreme Court, where the Court unanimously decided that the “wholly groundless” exception was inconsistent with the Federal Arbitration Act. Parties can agree to have an arbitrator decide the merits of a case, as well as gateway questions of arbitrability. When the parties’ contract delegates the question of arbitrability to an arbitrator, a court may not override the contract, even if the court thinks the argument that the arbitration agreement applies is “wholly groundless.”

Eventually, the case found its way back to the Supreme Court on the narrow issue of whether a carveout of certain claims in an arbitration agreement negates a provision allowing arbitrators to rule on their own jurisdiction. Despite hearing oral arguments in December 2020, the Supreme Court issued a one-sentence order revoking its decision to review the case, leaving this important question unanswered.

BOTTOM LINE:

The Supreme Court’s dismissal of *Henry Schein, Inc. v. Archer and White Sales* is disappointing for those hoping to gain clarity on how carveout provisions affect threshold arbitrability questions. This is especially true because arbitration remains an efficient mechanism for dispute resolution. The case serves as an important reminder that, when drafting arbitration provisions, clarity remains king. Hahn Loeser’s Construction Team has extensive experience both drafting and enforcing arbitration provisions so that claims can be timely and efficiently resolved. The Hahn Loeser team is experienced in the review and update of form contracts and are happy to help business owners stay up-to-date with changing law.

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